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In the Supreme Court of the United States

OCTOBER TERM 1953

No. 653

BERNARD EVERETT KLOCK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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C.A.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bernard Everett Klock, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled cause entered January 25, 1954.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 128) is not yet reported.

JURISDICTION

The judgment of the court below was entered January 25, 1954. The time for filing this petition was extended to March 24, 1954 by order of Hon. Robert E. Jackson, Associate Justice of the Supreme Court of the United States entered February 20, 1954 (R. 131). Jurisdiction of this court is invoked under *28 U. S. C.* Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the intentional exclusion from the jury panel in the instant case, of all citizens residing in 28 counties of the district, and the selection of grand and petit jurors from one county only of the district, deprived the petitioner of due process of law and the right to be indicted by a grand jury and the right to be tried by a jury of the district as guaranteed by the 5th and 6th Amendments to the Constitution of the United States.

2. Whether the petitioner was denied due process of law and effective representation by counsel by refusal of the trial court to accord to his trial counsel time to prepare for trial and by denial of inspection of documents in the possession or under the control of the government.

3. Whether the petitioner was in effect denied due process and deprived of his right to trial by a jury under the 5th Amendment, by the trial court's charge that a juror must be able to give a good reason for indulging a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution 5th Amendment, insofar as applicable provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * *."

U. S. Constitution 6th Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Wit-

nesses in his favor, and to have the Assistance of Counsel for his defense."

18 U. S. C. Section 1005 insofar as material provides:

"* * * Whoever makes any false entry in any book, report, or statement of such bank[1] with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Controller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System?

Shall be fined not more than $5000 or imprisoned not more than five years or both."

STATEMENT

On June 1, 1951, in the Northern District of New York 15 indictments[2] were returned against the petitioner, Bernard Everett Klock. In 14 of these, Klock was charged with misapplying and conspiracy to misapply funds of the Syracuse Trust Company a member of the Federal Reserve System whose deposits were insured by the Federal Deposit Insurance Corporation (R. 150a). The other indictment (R. 4a) which is the only one at issue here, charged Klock in two counts with making false entries in the books of the bank to conceal the misapplications. Klock was an assistant head bookkeeper in the bank (R. 27a) (R. 35). His principal codefendants in the 14 misapplication indictments were depositors whose insufficient funds checks over a four year period (1947-1951, R. 38, 39) had been paid by the bank in an amount exceeding two million dollars but held out and not charged to the depositors' accounts.

[1] "Such bank" includes member banks of the Federal Reserve System and banks insured by the Federal Insurance Corporation.

[2] See Appendix "A" of this brief Post p. 18.

The prosecutor introduced evidence as to the banking procedures of the bank (R. 5-38) depositors' ledgers (R. 10), control sheets (R. 11-15), charts (R. 17) and false control (Ex. 16, R. 92) of Ledger 65.

The petitioner's motion to inspect and copy or photograph bank records and to inspect the minutes of his testimony before the grand jury (R. 18a-24a)[3] and his motion for a continuance in order to prepare for trial (R. 7a-17a) were denied (R. 2a).[4]

The trial court excluded much documentary evidence consisting of bank records and reports (R. 104, 105, 114, 119, 122).

In charging the jury, the trial judge said "A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to give a reason" (R. 131a).

The entries were admitted. As the trial court instructed, the crucial question "is Klock's intent" (R. 132a). "Klock testified generally he had no intent to defraud or deceive any one; that he made the entries solely in the interest of the bank, the officers of the bank and the bank's standing in the community" (R. 131a, 132a).

The jury returned a verdict of guilty on both counts (R. 139a) and the defendant was sentenced to imprisonment for a term of four years on each count to run consecutively, a total of 8 years.

The defendant appealed (R. 151a) and the Court of Appeals for the Second Circuit affirmed his conviction (R. 130).

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[3]See R. 120a, 121a where trial court denied access to grand jury minutes although prosecutor had cross-examined defendant extensively using and reading selected excerpts from the grand jury minutes ostensibly to refresh recollection (R. 85a-100a). And the Court accepted the fiction of "recollection refreshed" (R. 121a) although the witness repeatedly insisted that his recollection was not refreshed (R. 86a, 87a, 89a, 95a).

[4]See also plea of defense counsel for a few day's time for trial preparation (R. 2) which was refused.

The Court below in its opinion in this case (R. 128-130) passed the question whether the challenge to the panel of grand and petit jurors was timely and held that there was no merit in the challenge as shown by the court's opinion in *United States v. Titus*, delivered the same day. So much of that opinion as is relevant is printed in Appendix "B" to this brief, p. 20, infra.

The Court below further held that refusal to permit inspection of the grand jury minutes was error so far as the defense of authority by bank officers was involved. But the court further held that the ruling would have been reversible error if the defense of authorization had been relevant to the charge of deceiving bank examiners (R. 129). The error was held harmless "in the face of Klock's clear testimonial admission that he had made the false entries to deceive the bank examiners" (R. 130). This, notwithstanding that nowhere in his testimony did Klock make such an admission (R. 131a, 132a).[5]

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[5]The trial judge indeed charged:
Klock, you remember his testimony, testified generally he had no intent to injure or defraud, or deceive anyone; that he made the entries solely in the interest of the bank, the officers of the bank, and the bank's standing in the community. That is as I recall it. So under these circumstances the crucial question (456) then for you to decide is Klock's intent in making the entries and you should consider all the evidence on this question. The government's proof bearing on such intent is the making of the entries themselves, and the other entries of May 19th and 24th; the dummy control ledger; the admissions to the Federal Bureau of Investigation agents; the location of the checks at his home; the dealings of Klock with Potter and Titus. **You should consider Klock's denial of unlawful intent**, and the bearing of the banking procedure at the Syracuse Trust Company, or the actions of the officers of such bank might have on such intent. And I charge you from the evidence alone you must decide did Klock make the entries with unlawful intent to injure, defraud, or deceive? **Did he make them honestly, in good faith, and with no such unlawful intent?** You must consider all the evidence, all the facts and circumstances at the time of those entries in deciding this important question of intent. (R. 131a, 132a).

REASONS FOR GRANTING WRIT

The decision below is believed to be erroneous.

1. This Court has said that in the drawing of jurors there must be no systematic, intentional exclusion of any geographical group. *Thiel v. Southern Pac. Co.,* 328 U. S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181, 166 *A. L. R.* 1412; *Ballard v. U. S.,* 329 U. S. 187, 192, 67 S. Ct. 261, 81 L. Ed. 181. Nevertheless the practice of excluding from any federal jury service 67% of the population of the Northern District of New York is approved by the judgment in the instant case.

2. The defendant was denied due process of law and effective representation of counsel by the trial court's refusal of inspection of documents and denial of time for adequate trial preparation.

3. The defendant was effectually denied due process and the right of trial by an impartial jury by the trial court's instruction that a juror must be able to give a good reason for entertaining a reasonable doubt. Thus the decision below conflicts with the applicable decisions of the 5th Circuit and the 8th Circuit. *Gomila v. United States,* C. A. 5th, 146 F. 2d 372; *Pettine v. Territory of New Mexico,* C. C. A. 8th, 201 F. 489.

I.

Geographical Discrimination in the Selection of Grand and Petit Jurors.

This Court has rightly said that there must be no systematic and intentional exclusion of any geographical group in the drawing of a jury. *Thiel v. Southern Pac. Co.,* 328 U. S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181, 166

A. L. R. 1412; *Ballard v. U. S.*, 329 U. S. 187, 67 S. Ct. 261, 81 L. Ed. 181.

In the case at bar is squarely presented the issue of whether this court really meant what it said in the *Thiel* case or whether a district court may continue to draw jury panels from a single county, city, ward or other subdivision of a district.

For forty years or more the judges of the Northern District of New York have disregarded this rule. For cases tried at Syracuse, grand and petit juries are drawn only from Onondaga County (R. 145a). Similarly jurors for the Albany terms are drawn only from Albany County and for the Utica terms, only from Oneida County. Thus the defendants were indicted by a grand jury and tried by a petit jury from which the court intentionally excluded all inhabitants of the 28 other counties of the district.

The time has come for the courts of the United States to follow the *Thiel* case, supra, and other pronouncements to the same effect, or for this Court to disavow the principle there stated.

There is no higher function of citizenship than jury service in the Federal Courts, unless it be the bearing of arms in defense of country. It is both a duty and a privilege in which all the population of the district is entitled to share. No county, town or city should be excluded permanently. Otherwise, the excluded persons are denied a share in the civic responsibilities of citizens and the litigants are deprived of their constitutional guarantees that they shall not be indicted or tried except by a jury of the district.

The Northern District of New York contains 29 counties. (See Table Appendix "C", infra, p. 22). Its area is 28,553 square miles. Its population is 2,418,585 persons.

Onondaga County contains 792 square miles and a population of 341,719 (1950 census; World Almanac, 1953, p. 422). Thus, the grand and petit juries for the case at bar excluded more than 86% of the population and more that 97% of the area of the district. If the district be regarded as composed of three divisions, in which jurors are drawn only from the three counties of Onondaga, Oneida and Albany, we still have the exclusion from any federal jury service of more than 67% of the population of the District.

The court below in *United States v. Gottfried,* 165 F. 2d 360, 364, ruled that there was no prejudicial irregularity in drawing grand and petit jurors for the Southern District of N. Y. from the three counties of Westchester, Bronx and N. Y. In that district however, the court noted that the total population of the district (1940) was 4,400,000 and that only 550,000 lived in the excluded territory Id., p. 363. Thus 87½% of the population of the Southern District was represented on the panel and only 12½% excluded.

Whatever may be said as to the systematic exclusion of one eighth of the population of the Southern District, it can hardly be said that the exclusion of 86% of the population of the Northern District could possibly result in a representative panel.

That part of the Empire State which constitutes the Northern District of New York is not only a rich farming and dairy country but encompasses the Adirondack Mountains, famous health resorts, spas, great lakes and water courses, extensive rail, air and highway transport systems, huge manufacturing plants of every description and people of various races, creeds and political and economic beliefs.

Can any judge say that Onondaga County is typical or representative of the other 28 counties? Or that Albany, Oneida and Onondaga counties are representative of the other 26 counties? Only a great and costly research project could even approximate an intelligent answer to that question. No private litigant can afford a survey of such magnitude. Is it not inevitable that the climate of opinion on public questions will vary greatly as between University towns and industrial cities; as between farming areas and summer resorts or bathing places, and as between small and large counties? Ithaca, the county seat of Tompkins County, is the home of Cornell University. Does the population of this county (59,122) entertain the same philosophy with respect to law, crime, justice and economics as Onondaga County (341, 719) which though primarily a great industrial area, is also the seat of a University? The tabulations of counties in Appendix "C", infra, p. 22, shows that the Northern District of N. Y. contains 25 counties each containing less than 90,000 people. Of these, ten counties have less than 50,000 inhabitants; two have less than 25,000 and one less than 5,000. All are excluded from jury service under the practice followed in the Northern District. Rensselaer County with a population of 132,607 is also excluded.

The selection of a grand jury wholly made up of Onondaga County residents, where the "White Flame" of publicity was greatest, gave to the prosecuting attorney "the privilege of installing in the Grand Jury Room the talesmen he wants and of disbarring those he does not want" which Judge Desmond in *People v. Prior,* 294 N. Y. 405, said: "Offends against public justice * * * and should not be countenanced by this court."

The Petit Jury. The petit jury was drawn from the same panel as the grand jury. The Northern District of New York has a population of 2,418,585. But the jury was drawn from Onondaga County only, containing 341,719 inhabitants to try bank offenses involving one of the largest banking institutions of Northern New York. The bank had 8000 depositor accounts. Its daily deposits averaged in number 1170 aggregating 2,427,327. Daily withdrawals numbered 765 checks aggregating 2,424,586. Daily holdout checks averaged 100 to 150 per day of which the bookkeepers could process only 85%.

Inevitably the story of the $2,400,000 overdraft on the Syracuse Trust Co. was front page news. Thus the systematic exclusion of jurors from other counties forced the defendant to trial before jurors who could hardly avoid the climate of opinion engendered by sensational publicity.

A reasonable regard for this court's injunction against geographical discrimination in the *Thiel* case, would have afforded a fairer trial.

II.

The Defendant Was Denied Due Process and Effective Representation of Counsel.

The defendant was led to believe that the case at bar would not be tried until after the cases of *United States v. Titus* and *United States v. Potter,* in each of which he was a codefendant (R. 15a-17a). He and his then counsel intended to rely upon able trial counsel retained by Potter and Titus. Klock made no arrangements for *trial* counsel until January 8, 1952 (R. 17a) when his case unexpectedly was set down for trial on January 14, 1952. Trial counsel forthwith moved for a continuance (R. 7a-

17a) and at the same time moved for inspection of bank records in the possession and control of the prosecutor, and inspection of the minutes of Klock's testimony before the grand jury (R. 19a-24a).

The motions are hastily drawn. In the light of the record (R. 106-120) they may be criticized as inartificial. However, the trial judge was fully informed of all the circumstances which rendered necessary, some preparation by newly retained trial counsel. For on the opening day of the trial, defense counsel again pleaded for a "few days longer" in which to prepare (R. 2).

In the light of after events it may be said that a continuance without adequate access and inspection of bank records would not have enabled counsel to make any adequate or effective preparation for trial. Both time and opportunity to examine the bank records were essential to such preparation. Without that preparation by counsel, defendant would have fared just as well if he had not been represented at all. Thus the refusal of a continuance and the precipitate trial of this case was, in our view, a serious infringement of his constitutional right to effective representation by counsel and contravened rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

As was said by the Supreme Court of Pennsylvania in *Commonwealth v. O'Keefe,* 288 Pa. 169, 173, 148 Atl. 73:

> "It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

See also *Neufield v. United States,* 73 App. D. C. 174, 182, 118 F. 2d 375, 383, Cert. den. 315 U. S. 798; *Coplon v. United States,* 191 F. 2d 749, Cert. den. 342 U. S. 926;

Thomas v. District of Columbia, 90 F. 2d 424; *People v. Davis,* 52 Mich. 569, 573, 18 N. W. 362, 363; *Gordon v. U. S.* (1953), 73 S. Ct. 369, 373.

In *United States v. Schneiderman,* D. C., S. D., Cal., 108 F. Supp. 731, 738, 739, the judge writing the opinion cited the words of Judge Learned Hand in *United States v. Andolschek,* 142 F. 2d 503, 506, in which this Court made plain that even reports of the Federal Bureau of Investigation, directly relevant and material to the issue of guilt, cannot be withheld by the government but must be opened up to the Court and to the defense. The government cannot use a part of such a document and withhold the rest even if the remainder be only indirectly relevant. "So far as they (documents) directly touch the criminal dealings, the prosecution * * * must be conducted in the open and will lay bare their subject matter" (*United States v. Andolschek,* supra).

What the Supreme Court said with respect to the United States Attorney in *Berger v. United States,* 295 U. S. 78, 88, is equally binding on the trial judge. We quote:

> "The United States Attorney is the representative not only of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Klock had been a witness before the grand jury several times and for six to eight hours. (R. 107a).

When later on trial he recalled the ordeal to which he had been subjected, was reminded of specific questions, which he could *not* recall, and was challenged by the judge to deny the verity of the grand jury minutes, he collapsed and yielded to the compulsion of judge and

prosecutor and admitted that "if it is there in the record I must have said it!" (R. 86a, 88a).

Klock on direct had testified that he had followed instructions of bank officers in handling overdrawn or insufficient funds checks (R. 52). He named the officers and specific depositors (R. 51-56). He was frequently interrupted by the trial judge (R. 51, 52, 58, 108, 109).

After repeatedly denying that the exerpts of his testimony before the grand jury refreshed his recollection (R. 86a, 89a, 95a) the badgered witness was asked by the judge to say whether his testimony before the grand jury was true and correct (R. 108a). What could he answer? A negative would imply perjury.

An intelligent witness or one better instructed would have refused to answer the judge's question until he had looked at the minutes of his testimony. But the judge had already refused inspection of the minutes. So a witness who affirms the truth of his testimony before the grand jury is required to convict himself on isolated, selected excerpts from that testimony without opportunity to weigh the answers in the light of the whole content.

III.

Due Process Denied by Charge on Reasonable Doubt.

The charge of the trial judge that "a reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to give a reason (R. 131a), in effect deprived the defendant of that trial by a jury which is guaranteed by the Sixth Amendment and denied due process of law.

The fallacy in that concept of a reasonable doubt has been so frequently demonstrated as to require little com-

ment. It should be enough to say that the fallacious rule so strongly stated by the trial judge precluded a juror from voting an acquittal even though he strongly doubted guilt or generally believed defendants not guilty, if he could not express a good reason for his feeling or conclusion. In other words, he must convict unless he could state a good reason for acquitting. See Sanborn, J., in *Pettine v. Territory of New Mexico,* supra; Ross, J. in *Owens v. United States,* 130 F. 279; and dissent of Frank, J. in *United States v. Farina,* 184 F. 2d 18.

Even had the trial judge been content to state his definition of reasonable doubt but once, instead of reiterating it, he would have gone beyond other similar faulty instructions. All other such instructions have merely stated, in effect, that "a reasonable doubt is one for which a reason can be given." See the *Pettine, Farina,* and *Owens* cases, supra. Under the instructions here, however, the juror must be prepared to give a "good reason" and, in another formulation, the doubt upon which the juror is privileged to acquit must be one which is *"substantiated,"* that is one which can be supported by evidence.

Prefacing all of these wrong definitions of reasonable doubt, the seed of suspicion was planted in the minds of the jurors that some of them, contrary to their oaths, might seek to use this particular rule of law as a "subterfuge" for not discharging an unpleasant duty (R. 130a).

If the whole charge on reasonable doubt were otherwise impeccable, it might be harmless for the judge to suggest that a juror claiming to have a reasonable doubt, might be resorting to a subterfuge to avoid the disagreeable duty of voting for conviction. Coupled however with the other disapproved portions of the charge, the lan-

guage used clearly conveyed the impression that a juror is resorting to a subterfuge if he steadfastly stands for acquittal on what to his mind is a reasonable doubt but for which he cannot formulate and express a "good reason".

As Judge Sanborn said in *Pettine v. Territory of New Mexico* (C. C. A.—8th), 201 F. 489:

> "To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. *It destroys the rule of reasonable doubt,* and substitutes for a reasonable doubt, a demonstrable doubt * * *." (Italics supplied)

No one can say with any certitude that a juror unskilled and untutored in articulating the reasons for his judgment may not, in the heated debates of the jury room, have been embarrassed and shamed into abandoning a determination to acquit by a reminder that he must be able to express a good reason or otherwise be suspected of resorting to a "subterfuge" as a device to avoid his duty to convict.

Above and beyond such objections, what good reason can be advanced for watering down and diluting the concept of reasonable doubt, a unique and highly prized protection of Anglo-American law, by suggesting that it, particularly, could be misused by some as a subterfuge? Certainly, the suggestion would not deter any juror bent on circumventing his oath by subterfuge. It could confuse, intimidate or mislead only the honest juror feeling a firm, but inarticulate belief in innocence.

To paraphrase this Court's decision in the case of *Kotteakos v. United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557: "is there not grave doubt that these cumu-

lative errors had substantial influence upon the result?"

As Judge Sanborn, forty years ago, so prophetically said in the *Pettine* case, supra,

> "once adopt this rule and instructions must inevitably multiply and add dialectics and confusion to the rule (of reasonable doubt) and its application."

We submit that the trial judge in recognizing "the crucial question" of defendant's criminal intent in making the entries (R. 132a) should have submitted that issue without limitation of the traditional presumption of innocence or the requirement that if any juror entertains a reasonable doubt of guilt, he should acquit.

To require a juror to explain his doubt is the exact equivalent of saying "You must convict or be ready to explain why you think the defendant should be acquitted!"

Is not this a most effective way to sabotage the right to trial by jury?

The court below made no reference to this question which was argued in this case as well as in the companion cases of *U. S. v. Potter* and *Klock*. But in the *Potter* case, Judge Frank noted that he would have held a similar charge reversible error except for the precedent in the Second Circuit established by *United States v. Farina,* 184 F. 2d 18, in which he wrote a dissenting opinion which we respectfully submit should be adopted by this court as a guide for all United States Courts. We reprint the relevant part of that opinion as Appendix "D", infra. p. 23.

CONCLUSION

The defendant did not waive any rights by lack of timely objection or challenge. It is elementary that an objection which could serve no useful purpose is unnecessary. The law ought not to require defense counsel to make empty gestures in a criminal case. And a waiver should be voluntary and intentional.

Obviously no objection or challenge would suffice to revoke the irregular 40 year practice of drawing jurors from one county and excluding inhabitants of all other counties. Nor should counsel be censured for not earlier raising the question in view of the *Gottfried* decision of the Court below (165 F. 2d 360, 364).

Likewise failure to make timely objection to the perverted definition on reasonable doubt is excusable. In view of the recent decision of the Court of Appeals in the *Farina* case, supra, an objection would have been as vain as was our argument of the same point in the *Potter* appeal in the court below. See Appendix "D".

The errors here argued are fundamental. We submit that the judgment below should be reversed.

WILLIAM W. BARRON,
Attorney for Petitioner.

APPENDIX A—Syracuse Trust Co. Indictments.

United States District—Northern District of New York
Indictments filed June 1, 1951 at Syracuse, New York

No. 30844 The United States

vs.

Bernard Everett Klock
Leslie L. Rott, Jr.
Jackson M. Potter

No. 30845 The United States

vs.

Bernard Everett Klock
Leslie L. Root, Jr.
Paul Titus

No. 30846 The United States

vs.

Bernard Everett Klock

No. 30847 The United States

vs.

Bernard Everett Klock
John R. Sims
Lewis N. Mancino

No. 30848 The United States

vs.

Bernard Everett Klock
H. Duane Clark
Minnie A. Clark

No. 30849 The United States

vs.

Bernard Everett Klock
Lipsio C. Notardonato

No. 30850 The United States
vs.
Bernard Everett Klock
Anthony R. Bersani

No. 30851 The United States
vs.
Bernard Everett Klock
Henry A. Bersani

No. 30852 The United States
vs.
Bernard Everett Klock
Andrew Rotondo

No. 30853 The United States
vs.
Bernard Everett Klock
Leon S. Abramsky

No. 30854 The United States
vs.
Bernard Everett Klock
Sherwald W. Sedgwick

No. 30855 The United States
vs.
Bernard Everett Klock
Angelo N. Delaport

No. 30856 The United States
vs.
Bernard Everett Klock
Peter K. Vlassis
Paul Copanas

No. 30857 The United States
vs.
Bernard Everett Klock
Joseph B. Meyers

No. 30858 The United States
vs.
Bernard Everett Klock
Henry Baranello

(Certificate for Clerk omitted in printing.)

APPENDIX "B"

Excerpt from Opinion of Court of Appeals for the Second Circuit in United States v. Paul Titus.

FRANK, *Circuit Judge*:

1. *Alleged illegal constitution of the grand jury and petit jury.*

The trial occurred in Syracuse, in Onondaga County, New York. The trial judge denied defendant's motion, made eight days before the first trial, to dismiss the indictment on the ground that the grand jury had been illegally constituted. The government urges that, under Criminal Rule 12(b)(3), this motion was not timely made;[2] we are not entirely free from doubt on the matter, but, in the circumstances, we think it desirable to pass on the motion's merits.

28 U. S. C. §1865(a) reads in part as follows: "Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service."

In 1914, the district court for the Northern District of New York made an order, never since modified, providing that when a stated trial term of that court is held at Syracuse, New York, the grand and petit jurors are to be drawn from Onondaga County. The Northern District contains 29 counties; on its westerly side it runs from

[2]Rule 12—see Notes of Advisory Committee—applies and requires such an objection to be raised by motion before trial.

Rule 12(b)(3) provides that such a motion to dismiss shall be made "before the plea is entered, but the court may permit it to be made within a reasonable time thereafter." At the time when defendant pleaded, in 1951, the district court gave him thirty days in which to make motions. The motion here in question was not made until months later, on April 28, 1952. This was 8 days before his second trial.

the Canadian border on the north to almost the Pennsylvania border on the south, and on its easterly side to the southerly limits of Albany County. The defendant contends that this method of selection, employed in choosing the grand jurors who indicted the defendant, violated his constitutional rights. We do not agree. See *United States v. Gottfried,* 165 F. (2d) 360, 363-365 (C. A. 2). For the same reasons we reject defendant's similar contention that the trial court erred in denying defendant's challenge to the array of the petit jury.

APPENDIX "C"

Population of Counties in Northern District of New York State

1950 Census. World Almanac, 1953, Page 422.

County	*Population*	*County*	*Population*
Albany	239,386	Montgomery	59,594
Broome	184,698	Oneida	222,855
Cayuga	70,136	Onondaga	341,719
Chenango	39,138	Oswego	77,181
Clinton	53,622	Ostsego	50,763
Cortland	37,158	Rensselaer	132,607
Delaware	44,420	St. Lawrence	98,897
Essex	35,086	Saratoga	74,869
Franklin	44,830	Schenectady	142,497
Fulton	51,021	Schoharie	22,703
Hamilton	4,105	Tioga	30,166
Herkimer	61,407	Tompkins	59,122
Jefferson	85,521	Warren	39,205
Lewis	22,521	Washington	47,144
Madison	46,215		

Total Population of District 2,418,585

APPENDIX "D"

Excerpt from Opinion of Court of Appeals for the Second Circuit in U. S. v. Klock and Potter

We set forth in a footnote[1d] that part of the judge's charge relative to "reasonable doubt." In *United States v. Farina,* 184 F. (2d) 19, 20 (C. A. 2), we dealt with a charge which said that "a reasonable doubt * * * is a doubt for which a juror who says that he has such a doubt about a defendant's guilt, can give a reason for entertaining." We stated, "Perhaps it was unwise to vary the customary formulae," but we held the charge not reversible error since no objection thereto had been made at the trial. Previously, in *United States v. Woods,* 66 F. (2d) 262, 265 (C. A. 2), we said: "We do not approve such a definition" of reasonable doubt, but refused to reverse. So here, while we do not hold that the charge amounted to error,[2] we think it would be well, if at the new trial, the judge adhered to the conventional formulation.

[1d] (Footnote omitted. The "reasonable doubt" charge in the Potter-Klock case was substantially identical with the charge given in the case at bar (R. 130a, 131a). The crucial phrases were read from the same book.)

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[2]For reasons stated in his dissenting opinion in **United States v. Farina,** 184 F. (2d) 19, 21 (C. A. 2), as well as **Gomila v. United States,** 146 F. (2d) 372 (C. A. 7), and **Pettine v. Territory of New Mexico,** 201 Fed. 489 (C. A. 8), **the writer would hold the charge reversible error but concurs here because of this Circuit's precedents.**

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 653

BERNARD EVERETT KLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 128-130) [1] is reported at 210 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1954 (R. 130). On February 20, 1954, Mr. Justice Jackson entered an order extending the time for filing a petition for a writ

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[1] The record in this case is contained in two volumes, one running from page 1 to 131 and the other, from page 1a to 151a.

of certiorari to and including March 24, 1954 (R. 131), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the fact that the grand and petit jury panels were drawn from inhabitants of the county in which petitioner was tried, rather than from the whole district of 29 counties deprived petitioner of a representative jury and whether such objection can be raised six months after the judgment of conviction.

2. Whether the trial court's denial of petitioner's motion to inspect certain documents and for a delay in the commencement of the trial constituted denial of due process of law and effective representation of counsel.

3. Whether the trial court's instruction that a reasonable doubt was a doubt for which you could give a reason was reversible error.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 U.S.C. (Supp. V) 1005 provides, in relevant part, that:

* * * * *

Whoever makes any false entry in any book, report, or statement of such bank [2] with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On June 1, 1951, a two-count indictment was returned against the petitioner, Bernard Everett Klock, in the United States District Court for the Northern District of New York, charging him with having on two separate occasions made a false and fictitious entry in the books of the Syracuse Trust Company (a bank insured by the Federal Deposit Insurance Corporation) with the intent to injure and defraud the Syracuse Trust Company, and to deceive its officers and the examiners appointed to

[2] The term "such bank" includes member banks of the Federal Reserve System and banks insured by the Federal Insurance Corporation.

examine its affairs (R. 4a-6a). The petitioner pleaded not guilty (R. 1a).

Just prior to the trial on this indictment, on January 8, 1952, petitioner filed motions for a continuance of the trial from its scheduled date of January 14, and to be allowed to inspect the minutes of his appearance before the grand jury which had returned the indictment against him. The basis for his motion for continuance was that he had been notified by the United States Attorney that certain companion cases, which involved misapplication and conspiracy to misapply the bank's funds, would be tried before his case. As a consequence, his counsel had not retained trial counsel, but had expected to receive assistance from the counsel trying the companion cases (R. 15a-17a). The affidavit of newly retained trial counsel that he needed time to prepare for trial was attached (R. 10a-13a). The additional request, for inspection of the grand jury minutes, and for certain bank records in the control of the prosecutor, was based on the allegation that they were required in the preparation of his defense and on the petitioner's desire not to vary from his grand jury testimony (R. 19a-23a).

Both motions were denied. It appears that the shift in the order of trial of the Syracuse Bank cases resulted from the illness of one of the codefendants in one of the other cases (R. 3).

At the trial, the Government introduced evidence that the petitioner, as assistant head bookkeeper of the Syracuse Trust Company, had charge of the processing of checks drawn on the bank and pre-

sented to it for collection. Several F.B.I. agents then testified that the petitioner had told them that he had, over a period of at least three years, authorized the honoring of certain checks although the accounts on which they were drawn did not at the time have sufficient funds; and that in order to prevent the discovery of this, he had taken the checks to his home with him; and, in addition, in 1950, had made entries to the accounts of the Easy Washing Machine Company and the Carrier Corporation showing withdrawals and deposits which were never reflected on the bank statements sent to those companies (R. 75, 77-78, 87-88).

Petitioner testified in his own behalf. He admitted making the entries charged, but said that he did it "in order to protect the bank itself and the bank's standing in the community and the officers involved * * *" (R. 58a, 60a). He claimed that he had acted pursuant to instructions from bank officers, although he admitted that he had made no such claim to the F.B.I. agents in telling his story earlier (R. 76a-78a). On cross-examination of the petitioner with reference to this question of authorization, some of his testimony before the grand jury was read to him for the purpose of refreshing his recollection. As to the matters thus brought out, petitioner frequently denied that his recollection was refreshed (e.g. R. 100a), but, as to each, testified explicitly that the answer he had given earlier before the grand jury was true (R. 107a, 108a, 113a).

At the close of the defendant's case, the trial court charged, *inter alia,* that (R. 130a-131a):

> This defendant, Klock, or any defendant, is not called upon to establish his innocence. The burden of proving his guilt rests on the prosecution throughout the case. He is entitled to the benefit of reasonable doubt on the whole case, on all the evidence, or lack of evidence, in this case, but if there be a reasonable doubt on any material question necessary for his conviction it must be resolved in his favor.
>
> Now, reasonable doubt is just what it says. It is not a mere whim, guess, or surmise, nor speculation, nor suspicion, nor can it be used as a mere subterfuge to avoid doing a disagreeable thing. It is such a doubt as reasonable men and women like yourselves may entertain after a careful and honest review and consideration of all the evidence in the case. It must be grounded in reason and must survive the test of reasoning or the mental process of a reasonable examination.
>
> The rule, of course, does not require that the guilt of the defendant should be established beyond all doubt, because in many instances that would be an impossibility. There is nothing, as you know, as well as myself, that can be said beyond all doubt. The law says only the defendant is entitled to a reasonable doubt, not all doubt. A reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to give a reason. It is not an imaginary or unsubstantiated doubt. You must

> decide this case on the evidence presented in this courtroom and if the evidence establishes the guilt beyond a reasonable doubt and with certainty it is your duty to render a verdict of guilty against the defendant on both counts in the indictment.

At the end of the charge, the court asked defense counsel if he had any exceptions to the charge, to which he replied "I am quite content with your Honor's charge" (R. 134a); he was then asked if he had any requests to charge and he said that he did not. The jury returned a verdict of guilty (R. 139a); the court entered judgment and sentenced the petitioner to imprisonment for four years on each count, the sentences to run consecutively (R. 150a).

Thereafter, and while an appeal was pending to the Court of Appeals for the Second Circuit (cf. R. 151a, 142a-144a), the petitioner filed a motion for relief in the nature of a writ of error coram nobis, contending that the judgment of conviction should be vacated because the panels from which the grand jury which indicted him and the petit jury which convicted him were drawn were improperly constituted (R. 142a-144a). Specifically, he pointed out that the grand and petit juries at Syracuse, where the case was tried, were drawn solely from inhabitants of Onondaga County, New York, thus systematically excluding all inhabitants of the remaining 28 counties of the Northern District of New York.

The motion was denied (R. 149a).

The Court of Appeals affirmed the judgment of conviction (R. 130). Although the record does not show that there was an appeal from the denial of the coram nobis motion, the Court of Appeals, after passing the question whether the contention therein raised was timely, specifically rejected it (R. 130).

ARGUMENT

1. The petitioner's first contention now is his belated contention below that there was geographical discrimination in the selection of grand and petit jurors.

a. It is clear that this argument has no merit. For administrative reasons, resulting from the tremendous size of the Northern District of New York, the jurors who sit in Onondaga County are all drawn from that county. This surely does not result in an arbitrarily unrepresentative grand jury in the sense that that was true where people of a particular economic level or of a particular sex or race had been excluded. See *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217; *Ballard* v. *United States,* 329 U.S. 187. Petitioner has not shown, and could not show, that there is something peculiar to the 350,000 people in Onondaga County which sharply distinguishes them from the total population of the Northern District in any way likely to have any relevance to this case. *United States* v. *Gottfried,* 165 F. 2d 360, 363-365 (C. A. 2), certiorari denied, 333 U.S. 860, rehearing denied, *id.* 883. It certainly could not have been local prejudice that petitioner was concerned about, for

he explicity declined to have his case transferred from Syracuse to Albany for trial (R. 117).

b. It is clear that, whatever merit this argument has, it was made too late. Rule 6(b)(2) of the Federal Rules of Criminal Procedure provides that a motion to dismiss may be based on a challenge to the grand jury array. Rule 12(b)(2) of the Rules provides that defenses and objections "based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial." However this rule is construed, it would certainly not permit a challenge to the grand and petit jury arrays to be made six months after conviction.

2. Petitioner's second contention is that he was denied due process of law and the effective right to counsel because he was denied a continuance before the trial of the case "for a few days longer" (R. 2), and because he was denied an opportunity to inspect the grand jury minutes of his testimony and certain bank records in the custody of the Government.

As we have pointed out, the indictment was returned June 1, 1951 (R. 1a). On December 14, 1951, the petitioner was notified by the United States Attorney that his case would be tried in January, but was told that certain companion cases would be tried first. On January 7, 1952, one of the companion cases was called for trial, and because of the illness of one of the defendants in that

case, it could not be tried. It was determined then that since the issues were relatively simple in petitioner's case, and since a jury had been assembled, it should be tried first. The case was set for January 14.

Although petitioner claims that he had then to hire a trial counsel and wanted to make an investigation of certain documents, it is perfectly plain that there had been ample time to do these things earlier. Even assuming that petitioner intended to rely on counsel in the companion cases for purposes of trial, the need to devise a defense and to get the relevant facts for that purpose must have been obvious much earlier. The trial court's exercise of discretion to refuse a continuance under the circumstances hardly qualifies as a want of constitutional protection. Cf. *United States* v. *Foster,* 81 F. Supp. 281 (S. D. N. Y.); *Wallace* v. *United States,* 174 F. 2d 112 (C.A. 8), certiorari denied, 337 U.S. 947.

Petitioner contends that the charge of the trial court that a "reasonable doubt is such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called upon to give a reason" (R. 131a) deprived him of the trial by jury guaranteed by the Sixth Amendment (Pet. 13-16). He argues that this charge requires, in effect, that he be able to state his reason for doubt to the scrutiny of others, a standard which he claims imposes too great a burden on the defendant particularly in the context of a charge which elsewhere refers to the fact that the doubt must be "substan-

tiated" and that they should not use the rule of law given them as a "subterfuge" to avoid doing their duty (Pet. 14).

a. The petitioner's contention in this respect is unsound. The charge, as a whole, makes it clear that "reasonable doubt" was defined fairly to the petitioner, however true it may be that the charge was not an ideal one. We have quoted the most relevant portion of the charge above, pp. 6-7. Thus, it will be observed that the court emphasized the fact that the burden of proving innocence was not on the petitioner, but that of proving guilt rested on the prosecution "throughout the case"; that the petitioner was entitled to the benefit of reasonable doubt both on the whole case and on any material question; that reasonable doubt was not "mere whim, guess, or surmise, nor speculation, nor suspicion, nor * * * a mere subterfuge to avoid doing a disagreeable thing" but that it was a doubt which might be entertained after a careful and honest review of all the evidence in the case. And later, after using the language the petitioner particularly complains of, the court added that reasonable doubt was not "an imaginary or unsubstantiated doubt".

The short of the matter is that the court was using fairly standard language to state the substance of what many courts have stated before, that a reasonable doubt cannot be a merely fanciful one, that it must have some kind of roots in the evidence and in a rational evaluation of that evidence. Such an instruction was, of course, not erroneous. *Williams* v. *United States*, 208 F. 2d 447 (C.A. 5), cer-

tiorari denied, No. 565, O.T. 1953, March 15, 1954; *Freeman* v. *United States,* 158 F. 2d 891 (C.A. 9), certiorari denied, 331 U.S. 805; *United States* v. *Farina,* 184 F. 2d 18 (C.A. 2), certiorari denied, 340 U.S. 875.

There is no significant conflict on this point. The view adopted by the court below, that the reasonable doubt formula used here, although not the most desirable phrasing of the concept, does not justify reversal, is in accordance with its earlier decisions on the point, *United States* v. *Farina, supra; Marshall* v. *United States,* 197 Fed. 511, 512 (C.A. 2); *United States* v. *Woods,* 66 F. 2d 262, 265 (C.A. 2); and it is in harmony with the view of the Third Circuit, *Murphy* v. *United States,* 33 F. 2d 896 (C.A. 3), certiorari denied, 280 U.S. 584. The Ninth Circuit, which at one time took a different view, *Owens* v. *United States,* 130 Fed. 279, has for some time been in accord with the Second and Third Circuits. See, e.g., *Louie Ding* v. *United States,* 246 Fed. 80; *Freeman* v. *United States, supra.* Although there are contrary decisions in the Eighth Circuit, *Pettine* v. *Territory of New Mexico,* 201 Fed. 489, and *Ayer* v. *Territory of New Mexico,* 201 Fed. 497, it seems doubtful whether these decisions create a conflict. In the first place, it does not appear in those cases whether the total context of the charges mitigated the possibly overharsh effect of the instruction, as was true in the present case. And, in the second place, this supposed conflict has already been pressed on this Court without success at least three times before, over a long period of

time, in cases which, like the present, sustain the charge. *United States* v. *Farina,* 184 F. 2d 18 (C.A. 2), certiorari denied, 340 U.S. 875; *Murphy* v. *United States,* 33 F. 2d 896 (C.A. 3), certiorari denied, 280 U.S. 584; *Williams* v. *United States,* 208 F. 2d 447 (C.A. 5), certiorari denied, No. 565, O.T. 1953, March 15, 1954; see also *Freeman* v. *United States,* 158 F. 2d 891, 896 (C.A. 9), certiorari denied, 331 U.S. 805.

b. There is a second and equally conclusive answer to petitioner's "reasonable doubt" contention. No objection was made to the charge at the time it was given. Indeed, petitioner's counsel stated that he was "quite content with your Honor's charge" and declined to offer any requests to charge (R. 134a).

The error in the instruction, if there was any, is exactly the kind of error as to which Rule 30 of the Federal Rules of Criminal Procedure precludes objection on appeal where there has been no objection below. The Rule provides:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

This rule obviously contemplates that a defendant must make his objections when there is still time to act upon them and that he may not save them as a basis for obtaining a reversal in an appellate court.

The objection here relates to a matter which could easily have been cured if called to the attention of the court. It is at most an inartistic phrasing of an amorphous concept. Hence, it is clearly not such substantial error as to justify reversal in the absence of objection.

CONCLUSION

For the foregoing reasons, it is respecfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

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